# No. 12,390

IN THE

# United States Court of Appeals

## For the Ninth Circuit

---

KAUFMAN-BROWN POTATO COMPANY, a Partnership composed of Charles H. Kaufman and Albert H. Brown, CHARLES H. KAUFMAN and ALBERT H. BROWN,

*Appellants,*

vs.

WAYNE LONG, as Trustee in Bankruptcy of the Estates of Gerry Horton and J. D. Althouse, doing business as Gerry Horton Company, a Co-Partnership; Gerry Horton and J. D. Althouse, doing business as Gerry Horton Farms, a Co-Partnership; GERRY HORTON, an individual, and J. D. ALTHOUSE, an individual,

*Appellees.*

---

## BRIEF FOR APPELLEES.



JOHNSTON, BAKER & PALMER,
359 Haberfelde Building, Bakersfield, California,
*Attorneys for Appellees.*

## Subject Index


Page

Statement in reference to appeals ..... 2

Statement of the case ..... 2

Questions involved and presented ..... 6

Argument ..... 7

I.

Kaufman-Brown Potato Company was a partner of Gerry Horton Farms, who was raising potatoes in 1944 ..... 7

II.

When Kaufman-Brown with two other persons filed an involuntary petition in bankruptcy against Gerry Horton Farms of which it was a partner and of which it was a creditor, it consented to the adjudication of said partnership of which it was a member ..... 30

III.

Findings of fact by special master when based on substantial evidence will not be disturbed by Appellate Court ..... 38

IV.

The creditor's claim of Kaufman-Brown Potato Company (one of the partners) should not be allowed until after non-partner creditors' claims are paid in full ..... 40

Conclusion ..... 40

## Table of Authorities Cited

### Cases


| | Page |
|---|---|
| Associated Piping and Eng. Co. v. Jones, 17 Cal. App. (2d) 107 | 23 |
| Calkins v. Calkins, 63 Cal. App. 292 | 27 |
| Clark v. Gridley, 49 Cal. 105 | 27 |
| Diamond Laundry Corp. v. Calif. Employment Stabilization Commission, 162 Fed. (2d) 398 | 39 |
| Donleavey v. Johnston, 24 Cal. App. 319 | 27 |
| Fisher v. Sweet, 67 Cal. 228 | 26 |
| Gray v. The Janss Invest. Co., 186 Cal. 634 | 26 |
| Hunter v. Hunter & Drew, 8 Fed. Supp. 84 (D.C. La.) | 37 |
| In re Filmar, 177 Fed. 170 | 37 |
| In re Fuller, 9 Fed. (2d) 553 | 37 |
| In re Harris, 108 Fed. 517 (D.C. Ohio) | 36 |
| In re Henry Duffy Players, 50 Fed. (2d) 737 | 38 |
| In re Rice, 164 Fed. 514 (D.C. Pa.) | 40 |
| Kersch v. Taber, 67 Cal. App. (2d) 504 | 22 |
| Lanpher v. Warshauer, 28 Cal. App. 457 | 28 |
| Lusher v. Silver, 70 Cal. App. (2d) 588 | 23 |
| Lyon v. MacQuarrie, 46 Cal. App. (2d) 119 | 25 |
| Meek v. Centre County Bkg. Co., 268 U. S. 426, 69 L. Ed. 1028 | 37 |
| San Joaquin L. & P. Corp. v. Costaloupes, 96 Cal. App. 322 | 29 |
| Stenian v. Tashjian, 178 Cal. 623 | 26 |
| Streeter and Riddell, Inc. v. William S. Bacon, 49 Cal. App. 327 | 26 |
| Thompson v. O. W. Childs Estate Co., 90 Cal. App. 552 | 25 |
| Ulter v. Irwin, 132 Fed. (2d) 415 (C.C.A. Tex.) | 26 |
| Universal Sales Corp. v. Cal. Press Mfg. Co., 20 Cal. (2d) 751 | 39 |

Page
Weisstein Bros. & Survol v. Laugharn, 84 Fed. (2d) 419.... 38
Westcott v. Gilman, 170 Cal. 562..... 28

## Statutes

Bankruptcy Act, Sec. 5-I ..... 36
Bankruptcy General Order 47, U.S.C.A., Title 11..... 38
Bankruptcy Rule 52, U.S.C.A., Title 28..... 39

Corporations Code, Sec. 15006 (1) ..... 22
Corporations Code, Sec. 15007 (4) ..... 23

## Text Books

20 Cal. Jur., Sec. 7, page 686..... 25

Remington on Bankruptcy, Vol. 6, Sec. 2920..... 40

No. 12,390

IN THE

# United States Court of Appeals

## For the Ninth Circuit

---

KAUFMAN-BROWN POTATO COMPANY, a Partnership composed of Charles H. Kaufman and Albert H. Brown, CHARLES H. KAUFMAN and ALBERT H. BROWN,

*Appellants,*

vs.

WAYNE LONG, as Trustee in Bankruptcy of the Estates of Gerry Horton and J. D. Althouse, doing business as Gerry Horton Company, a Co-Partnership; Gerry Horton and J. D. Althouse, doing business as Gerry Horton Farms, a Co-Partnership; GERRY HORTON, an individual, and J. D. ALTHOUSE, an individual,

*Appellees.*

**BRIEF FOR APPELLEES.**

### STATEMENT IN REFERENCE TO APPEALS.

We have not changed the heading even though it is incorrect. The appellees are not as listed in the heading above. Gerry Horton Company is not involved in the appeal in any manner. The judgment which was rendered by the Referee and affirmed by the District Judge found that Gerry Horton and J. D. Althouse, doing business as Gerry Horton Farms, and Charles H. Kaufman and Albert H. Brown, doing business as Kaufman-Brown Potato Company, were copartners doing business as Gerry Horton Farms, in the business of raising potatoes during the year 1944, and that the Gerry Horton Farms, the copartnership that was raising potatoes, was a debtor of Kaufman-Brown, and was the partnership known as Gerry Horton Farms, against whom Kaufman-Brown filed the involuntary bankruptcy petition with two other creditors. Tr. pp. 68-69. Therefore the only appellee is Wayne Long as trustee in bankruptcy of the estate of Gerry Horton Farms, a copartnership composed of Kaufman-Brown Potato Company, a copartnership composed of Charles H. Kaufman and Albert H. Brown, and Gerry Horton Farms, a copartnership composed only of Gerry Horton and J. D. Althouse.

---

### STATEMENT OF THE CASE.

There were three partnerships:

1. Gerry Horton Company, a copartnership composed of Gerry Horton and J. D. Althouse. This partnership was adjudicated a bankrupt. Tr. pp. 67-69.

2. Gerry Horton Farms, a copartnership composed of Gerry Horton and J. D. Althouse. This partnership was not adjudicated a bankrupt on the involuntary petition, but the partners consented to bankruptcy court administration by turning over the assets to said court. This partnership was not in the business of raising potatoes. Kaufman-Brown Potato Company was not a creditor of this partnership. Tr. pp. 67-69.

3. Gerry Horton Farms, a copartnership composed of Kaufman-Brown Potato Company, a copartnership, and Gerry Horton Farms, a copartnership. This partnership was adjudicated a bankrupt on petition of three creditors, one of which was Kaufman-Brown Potato Company, but the petition did not set forth that said Kaufman-Brown Potato Company was a partner. This partnership was in the business of raising potatoes, and Kaufman-Brown Potato Company was a creditor. Tr. p. 69.

In the fall of 1943, Gerry Horton, a partner of Gerry Horton Farms, composed of himself and J. D. Althouse, and a partner of Gerry Horton Company, composed of himself and J. D. Althouse, conferred with Charles H. Kaufman and Albert H. Brown, copartners of Kaufman-Brown Potato Company. Tr. pp. 145-247. Details of financing to grow and harvest potato crop to be grown on lease land was discussed. All that was discussed the parties do not recall, but Kaufman-Brown Potato Company was to advance $100.00 per acre, Gerry Horton was to supply the farming equipment, the leases were to be thrown in

on the deal, and Kaufman-Brown Potato Company was to get a certain percentage. Tr. p. 255. Mr. Kaufman stated that whatever the conversation was, it terminated in the execution of the written contract. Tr. pp. 149-150. Exhibits D and E, Tr. pp. 169-181. Mr. Horton says he told the California attorney who prepared the contracts the conversation which he had in Chicago with Mr. Kaufman and Mr. Brown Tr. pp. 255, 256, 260, 277, 278.

The contracts, which are the same except Kaufman-Brown had 50% loss or profit on one and 40% loss or profit on the other, contain the following: Gerry Horton and J. D. Althouse referred to as first parties; Charles H. Kaufman and Albert H. Brown referred to as second parties. First parties had lease on 192½ acres of land and second parties desirous of buying 50% interest in potato crop. Tr. p. 169. Agreed between parties (1) First parties conveyed to second parties undivided 50% interest in potato crop to be grown. (2) Second parties paid to first parties $19,250.00 for said interest. (3) If cost of planting and raising exceed $19,250.00 then to be paid by first parties. Each of parties to pay 50% of cost of harvesting. Tr. p. 170. (4) Profits are to be divided equally between *partners* after repayment of $19,250.00 to first parties and after repayment of advances made by second parties. Tr. pp. 170-171. (5) First parties to keep full books of account and records of all receipts and disbursements in connection with said potato crop, to be at office in Sill Building and open to inspection of second parties. (6) First parties war-

rant potato crop free from liens. (7) Any loss to be assumed 50% by first parties and 50% by second parties. (8) Option given to second parties to purchase crop. If no prevailing price, second parties to sell crop through Terminal Market, charging 10¢ per sack for said service rendered to the *partners* hereto. Money to be sent to first parties for accounting and distribution as set forth in contract. Tr. p. 172. Any mark up by virtue of O.P.A. 50% to first parties and 50% to second parties. (9) First parties to raise crop and furnish equipment. (10) First parties to give second parties chattel mortgage covering their undivided interest as security for their faithful performance. (11) Copy of note given with chattel mortgage. (12) Chattel mortgages solely as security for the performance and conditions contained in agreement and no other purpose, and first parties not to be held liable for loss resulting from causes beyond control of first parties. Tr. p. 174.

Gerry Horton was to manage the operation of farming. Tr. p. 272. The contracts provided for same. Tr. pp. 169-181. Kaufman-Brown Potato Company had option to buy all potatoes and if not bought to manage the sale of same in Chicago. Tr. p. 259. Kaufman-Brown Potato Company owned one-half of potato crop. Tr. p. 189. Money sent by Kaufman-Brown Potato Company was deposited in account of Gerry Horton Farms and Gerry Horton Company. Kaufman-Brown Potato Company had no right to sign checks on the accounts. Tr. p. 272. Kaufman said Horton did not furnish bank statements as promised. Tr. p. 164.

Horton did not use any money sent by Kaufman-Brown Potato Company except in the potato venture. Tr. p. 276. Kaufman and Brown came out to survey the operations, its progress, and made recommendations as to when the potatoes were to be dug. They had men helping them around the warehouse. Tr. p. 271. Both Kaufman and Brown came out to Bakersfield, California, to see if deal was making profit. Tr. pp. 159-160. Kaufman and Brown used same office as Gerry Horton. Tr. pp. 242-243. Books were open to inspection by Kaufman-Brown Potato Company. Tr. p. 243.

---

**QUESTIONS INVOLVED AND PRESENTED.**

1. Was Kaufman-Brown Potato Company a general partner of Gerry Horton Farms in the raising of potatoes in Kern County during the period from November 16, 1943 to July 8, 1944?

2. Did Kaufman-Brown Potato Company (with two other persons) in filing an involuntary petition in bankruptcy against said Gerry Horton Farms, of which it was a partner, and of which it was a creditor, consent to the adjudication of said partnership of which it was a member?

3. Should Kaufman-Brown Potato Company (a partner) creditor's claim be allowed until after non-partner creditors' claims are paid in full?

## ARGUMENT.

### I.

### KAUFMAN-BROWN POTATO COMPANY WAS A PARTNER OF GERRY HORTON FARMS, WHO WAS RAISING POTATOES IN 1944.

The two contracts, Exhibits D and E, Tr. pp. 169-181, are identical except as to amounts and except that on one contract Kaufman-Brown Potato Company was to receive 40% of the profits or pay 40% of the losses and on the other Kaufman-Brown Potato Company was to receive 50% of the profits or pay 40% of the losses. The contracts provide as follows:

> "The undisputed facts are that Gerry Horton Farms, a copartnership composed of Gerry Horton and J. D. Althouse, entered into two agreements with Kaufman-Brown Potato Company, a copartnership composed of Charles H. Kaufman and Albert H. Brown, relative to the raising of potatoes in Kern County, and that copies of the originals of said agreements are attached to trustee's petition which is attached to this certificate. The two contracts are identical except as to amounts and except that on one contract Kaufman-Brown was to receive 40% of the profits or losses and on the other contract Kaufman-Brown was to receive 50% of the profits or losses. The agreements provide as follows: Tr. pp. 169-181.
>
> 1. Kaufman-Brown Potato Company purchased a 50% interest in the potato crop to be planted, raised and harvested upon the property and Kaufman-Brown was to pay a consideration for the interest. Paragraphs 1 and 2, Tr. p. 170.

2. Kaufman-Brown was to pay 50% of the harvesting cost of the potatoes. Paragraph 3, Tr. p. 170.

3. The net proceeds or profits obtained from the sale of the potato crop were to be divided between the *partners* on a basis of 50% to each. The contracts here specifically mentioned the partners. In other places in the contract where it mentions Kaufman-Brown is to do something it refers to Kaufman-Brown as second parties, and where Althouse and Horton are to do certain things it refers to them as first parties. Paragraph 4, Tr. pp. 170-171. First party was to keep proper books of all expenditures and the books and accounts and all other records were to be open to inspection and access of the second parties. Paragraph 5, Tr. p. 171.

4. Kaufman-Brown was to pay one-half of the losses. Paragraph 7, Tr. p. 172.

5. Kaufman-Brown had facilities for disposing of potatoes in Chicago, and Kaufman-Brown had a right to purchase the potatoes and if there was no prevailing market for the sale of potatoes, then Kaufman-Brown was to handle the potatoes through the Terminal Market at Chicago as Agent and they were to be paid a charge of 10¢ per sack as commission for their services rendered to the Partners. Here again the contract refers to *partners* when dealing with all of the parties and the contract further provides for equal division on mark ups. Paragraph 8, Tr. pp. 172-173.

6. Gerry Horton and J. D. Althouse had equipment and land leased to raise potatoes and

Gerry Horton and J. D. Althouse were to devote their best efforts to the raising and harvesting of the potatoes and to furnish equipment. They were to manage the farm operation. Paragraph 9, Tr. p. 173.

7. Kaufman-Brown had Gerry Horton and J. D. Althouse execute a promissory note secured by chattel mortgage for advancement and the contract provides 'that said advancement is solely for the security of the performance and conditions herein contained and for no other purpose and Gerry Horton and J. D. Althouse are not to be held liable to Kaufman-Brown for losses occasioned by weather', etc. Paragraphs 11 and 12, Tr. pp. 173-174."

Testimony of Kaufman regarding contracts was:

"Referee. In any event, whatever your conversation was, it terminated in the execution of a written contract, which you have here?

Mr. Kaufman. That's right." Tr. pp. 149-150.

Gerry Horton, who was called as a witness by Kaufman-Brown, testified on cross-examination:

"Mr. Johnston. Mr. Horton, you don't remember all the conversation you had back in Chicago with Mr. Kaufman and Mr. Brown, do you?

Mr. Horton. No, only just what I referred to a little while ago.

Mr. Johnston. And you don't remember all the conversation you had over the telephone from Minneapolis, do you?

Mr. Horton. No, I don't believe I did.

Mr. Johnston. You don't remember all the conversation you had with your attorney, Mr.

Chain, when you came back and asked him to prepare this agreement that is introduced in evidence, Defendant's Exhibit 'E'?

Mr. Horton. No.

Mr. Johnston. But what you told Mr. Chain to put in the contract was based upon what your agreement was with Mr. Brown and Mr. Kaufman back in Chicago?

Mr. Colby. Just a moment. That is asking, introducing matter not in evidence; your Honor will hear the question as told the reporter.

Mr. Johnston. Read it.

(Question is read by reporter.)

Mr. Johnston. I will change it.

Mr. Johnston. What you told Mr. Chain was what your conversation was back in Chicago, was it?

Mr. Horton. Yes.

Mr. Johnston. With Mr. Kaufman and Mr. Brown?

Mr. Horton. Yes.

Mr. Johnston. Then Mr. Chain prepared this contract, and you sent it back to Mr. Brown and Mr. Kaufman after you had read it?

Mr. Horton. Yes.

Mr. Johnston. And then you and your partner signed it?

Mr. Horton. Yes.

Mr. Johnston. Now, then, after that contract was entered into, you went into this deal out at Arvin, didn't you?

Mr. Horton. Well, they were all decided on at the same time; but for some reason or other there is a difference in the date of our contracts.

Mr. Johnston. Well, one of them had to be corrected on account of the acreage; isn't that it?

Mr. Horton. That is right.

Mr. Johnston. And that was dated later?

Mr. Horton. That is right.

Mr. Johnston. And when you related your conversation to Mr. Brown—or to Mr. Chain, it dealt with the conversation that you had had with Mr. Kaufman and Mr. Brown as to both contracts, didn't it?

Mr. Horton. That is right." Tr. pp. 277-279.

On March 21, 1947, Attorney Kendall, representing Kaufman-Brown Potato Company, stated to the court that Kaufman-Brown Potato Company was a general partner in the raising of potatoes.

"Mr. Kendall. Your position is, Mr. Johnston, that they are partners only in so far as this crop deal is concerned.

Mr. Johnston. As far as these contracts, they were in partnership on that.

Mr. Kendall. On the general farming crop, no; they were general farming partners as far as potatoes were concerned; yes. I do not think they were liable for the planting of the tomatoes, or for any brokerage transactions that the other company had. * * *" Tr. p. 189.

Testimony of Mr. Kaufman shows partnership:

"He (Horton) never furnished us with the bank statements, although he had promised repeatedly to do it." Tr. p. 164.

"Mr. Kendall. Did you consult with Gerry Horton regarding the financial outcome of the Arvin contract?

Mr. Kaufman. I did.

Mr. Kendall. And what was the conversation?

Mr. Kaufman. At the time, Mr. Horton stated that the records were not complete, but he was of the opinion that the Arvin deal would show a small loss.

Mr. Kendall. Did he give you any figures at that time?

Mr. Kaufman. At that time he said it may run into two or three thousand dollars.

Mr. Kendall. Did you have any conversation with Mr. Horton regarding the outcome of the Shafter deal?

Mr. Kaufman. I did.

Mr. Kendall. And what was that conversation?

Mr. Kaufman. Mr. Horton stated that in his opinion the Shafter deal would show a profit sufficient to overcome the deficit at Arvin.

Mr. Kendall. Mr. Horton had all the facts and figures before him at his office when he made those representations?

Mr. Kaufman. That's right; he did." Tr. pp. 159-160.

Testimony of Mr. Horton shows partnership:

"Q. (By Mr. Colby). You stated that Mr. Brown and Mr. Kaufman came out to California. Will you tell us what they did in connection with your farming operations on the Shafter and Arvin properties?

A. (Gerry Horton). That is right. Yes, they came out to survey the operation, its progress, and they had certain recommendations to make as to when we would start digging the potatoes, because it was naturally of interest to them; and they had men helping them around the warehouse. * * *" Tr. p. 271.

The appellants, at page 25 of their brief, set forth certain alleged elements which are claimed to appear in the partnership agreements, which appellants claim show that the agreements did not create a partnership. We cannot agree with the conclusions reached by appellants. The alleged elements are taken up in the order of the letters given them by appellants:

> (a) "The repayment of the advancement of money made by Kaufman-Brown Potato Company to the bankrupts was secured by a crop mortgage in each instance."

In (i) appellants set forth that the agreement provided that first parties, that is, Gerry Horton and J. D. Althouse, would not be liable to Kaufman-Brown Potato Company for losses for any causes which were beyond the control of Gerry Horton and J. D. Althouse. Kaufman-Brown purchased a half interest in the potatoes, which was the only valuable asset. The potatoes then became the property of the copartnership and Kaufman-Brown received a chattel mortgage upon the half interest of Gerry Horton and J. D. Althouse as a guarantee of the performance of the agreement and for no other purpose.

> (b) "No provisions exist relating to a bank account, or who should draw upon it."

The partnership agreement provided that Gerry Horton and J. D. Althouse should keep books of account and records, and all money obtained, even if the potatoes were purchased by Kaufman-Brown, was to be paid to them and an accounting was to be made

and the profits were to be divided according to agreement. There was no necessity for providing for a bank account.

> (c) "The sale of the potato crop to Kaufman-Brown Potato Company at the prevailing prices, and at its option, was to be made to them as purchasers."

Gerry Horton and J. D. Althouse could not sell the potatoes. Kaufman-Brown had a right to purchase the potatoes at the prevailing market price and if there was no prevailing market price, then the potatoes were to be sold at the Terminal Market in Chicago by Kaufman-Brown so that Kaufman-Brown jointly with Gerry Horton and J. D. Althouse controlled the sale of the potatoes.

> (d) "No language appears to the effect that they are entering into a partnership, nor that there is any sale of a partnership interest."

The contracts provide that when certain things were to be done by the first parties and second parties jointly that they were referred to as partners; and the contracts provide that Kaufman-Brown had purchased a one-half interest in the potato crop.

> (e) "No account is taken therein of the amount of capital to be invested by Gerry Horton Farms, nor does it provide for the usual provision that upon liquidation the parties shall be repaid ratably their capital."

Appellants are assuming that ordinary partnership contracts provide for pro rata upon dissolution. Such

is not the case. The matter is usually taken care of by law. The contracts or partnership agreements specifically provide that each of the persons were to receive the return of their advances and after the advances were paid the profits were to be divided, and if no profits, then the losses were to be divided.

(f) Kaufman-Brown was to receive back its advances before Gerry Horton and J. D. Althouse.

The amount of money mentioned in the chattel mortgage was not a loan, but was the amount paid by Kaufman-Brown for the one-half interest in the potato crop, and they were to receive the amount back out of the potato crop, and if there was a failure of the potato crop they were not to receive the return of their money. They were advancing $100.00 an acre, which was the total amount necessary to plant and grow the potatoes.

(g) Kaufman-Brown had a right to sell the potatoes through Terminal Market at Chicago if no prevailing market.

This clearly shows that Kaufman-Brown jointly had a right to carry on part of the business as the potatoes could not be sold except through Kaufman-Brown, Kaufman-Brown having an option to first purchase the potatoes for itself, and if there was no prevailing market, then they would have the right to sell them upon the Chicago market.

(h) No name was mentioned in the agreements for the partnership.

After the agreements were signed Gerry Horton Company continued to operate, but Gerry Horton Farms, which was composed only of Gerry Horton and J. D. Althouse, was not in the business of raising potatoes at that time and was not in any business during the period of the contract or partnership agreement with Kaufman-Brown, and the copartnership between Gerry Horton and J. D. Althouse, as first parties, and Charles H. Kaufman and Albert H. Brown, as second parties, operated and farmed the potatoes under the name of Gerry Horton Farms. This was the copartnership against which Kaufman-Brown filed the bankruptcy petition and was the copartnership against which Kaufman-Brown had a claim and it was the copartnership which was raising potatoes. The other partnership of Gerry Horton Farms, which was composed only of Gerry Horton and J. D. Althouse, was not in business and was not raising potatoes at this time, and was not a debtor of Kaufman-Brown.

In appellants' brief, at page 27, it is stated:

"THE CONDUCT OF THE PARTIES UNDER THE AGREEMENTS NEGATIVE AN INTENT TO FORM A PARTNERSHIP, OR THAT A PARTNERSHIP EXISTED."

There are then listed certain things which appellants believe prove that there was not a partnership. We cannot concur with appellants upon their belief and, further, some of the statements made are incorrect. We have set forth the appellants' statements

and after each one of the statements have set forth the evidence pertaining to the question, as well as an explanation as to the inaccuracy of appellants' beliefs.

> (a) "The complete control, management and operation of the Gerry Horton Farms and of the potato crop were in the hands of and actually carried out by Gerry Horton and J. D. Althouse, its partners."
>
> (b) "Neither Kaufman nor Brown, nor their partnership, Kaufman-Brown Potato Company, had any part in the management of the business of Gerry Horton Farms or the planting, harvesting and sale of the potato crop (Tr. pp. 271-272)."

Paragraph 9 of contract (Tr. p. 173) provides that first parties, Gerry Horton and J. D. Althouse, should raise, plant and harvest the potatoes. Paragraph 8 of contract (Tr. p. 172) provides for second parties, Charles H. Kaufman and Albert H. Brown, handling potatoes through markets in Chicago.

Kaufman and Brown came to California and made survey of the operations and made recommendations as to when potatoes should be dug. They had men helping them around the warehouse. Tr. p. 271. Both Kaufman and Brown came to Bakersfield, California, to see if deal was making a profit. Tr. pp. 159-160. They used same office as Gerry Horton. Tr. pp. 242-243.

If the arrangement was not a partnership, then Kaufman-Brown would have done like all other potato buyers do—make a straight loan, with option to

buy potatoes, without any share in profit or loss, and grower would not have been released on note if loss of crop for any cause, as in case before court.

> (c) "The leases of the land at Shafter and Arvin to Gerry Horton Farms, executed prior to the dates of the two agreements, and the equipment thereon were never assigned to the alleged partnership, nor did Kaufman-Brown Potato Company ever acquire any interest therein (Tr. pp. 269-270)."

Contract, paragraph 9, Tr. p. 173, provides Gerry Horton and J. D. Althouse were to furnish equipment. Leases had no value, but one-half of the potato crop (the basis of the partnership) was conveyed to Kaufman-Brown Potato Company (paragraph 1, Tr. p. 170). The potato crop was what the parties expected would have the value, and was the property owned by the partnership, the Gerry Horton Farms that was raising potatoes, and of which Kaufman-Brown was a partner. The old Gerry Horton Farms was not raising potatoes. Tr. p. 69.

> (d) "Gerry Horton testified that he and J. D. Althouse were engaged in the buying and selling and speculating in potatoes and produce in general as the Gerry Horton Farms and Gerry Horton Company, in both of which companies he and J. D. Althouse were partners (Tr. p. 254)."

No testimony was given that either of the Gerry Horton Farms was buying and speculating in potatoes. It was only Gerry Horton Company, of which Kaufman-Brown was not a partner, which was not in

the business of raising potatoes. At Tr. p. 254 Gerry Horton testified:

"A. Yes, I was engaged in the buying and selling and speculating in potatoes and produce in general.

Mr. Colby. Q. I see. Of which the Kaufman-Brown Potato Company did not share?

A. They had no share in the outside operations."

At Tr. p. 274:

"Mr. Colby. Q. * * * Did the Horton Company buy potatoes from other farms and shippers and ship them under that deal? (Farm deal.)

Gerry Horton. A. Not under that deal. No. It is the practice of Gerry Horton Company to buy, ship and sell potatoes, both from other growers,——

Mr. Colby. Q. Did they do so during the operations of the Shafter-Arvin deal to the Kaufman-Brown Potato Company?

Gerry Horton. A. I can't testify correctly as to that, because it is quite possible we did on their request. We acted as their agents in a good many cases when they were unable to buy from other growers. We many times bought them under the name of Gerry Horton Company and shipped them to them. And that might have happened during this period of time. I can't testify for sure." Tr. pp. 274-275.

Cross-examination:

"Mr. Johnston. Q. Now, Mr. Colby asked you if you were in any other kind of business, and you

said you were buying and selling. Now, the buying and selling was handled by the Company and not by the farm?

Gerry Horton. A. That is correct." Tr. p. 279.

(e) "The money received from Kaufman-Brown Potato Company for the shipments of potatoes to them was deposited by Gerry Horton, either in the bank account of Gerry Horton Farms, or Gerry Horton Company, and not to the credit of any partnership (Tr. p. 273)."

The money was deposited to either the account of the Farms or the Company. Tr. p. 273. Horton did not use any money sent by Kaufman-Brown Potato Company except in the potato venture. Tr. p. 276. Para. (5) Tr. p. 171 provides that first parties were to keep books of account. The money was credited to the partnership that was raising potatoes.

(f) "When the transactions involved in the agreements were concluded, Gerry Horton, on July 12, 1944, sent Kaufman-Brown Potato Company checks on which Gerry Horton had caused the words "On Loan" to be placed, which checks were subsequently dishonored and from the basis of the claim now under consideration of Kaufman-Brown Potato Company against the Gerry Horton Farms (Tr. p. 264)."

Check was written by bookkeeper. "On Loan" was on check. Loans had been made by Kaufman-Brown Potato Company to harvest potatoes, so why should not the words "On Loan" be written on check. It does not prove anything in the dispute.

(g) "Kaufman-Brown Potato Company had to pay for the potatoes shipped to them by the bankrupts in order to commandeer their delivery (Tr. pp. 273, 260, 172)."

The contracts provided that Kaufman-Brown had option to buy the potatoes at prevailing market price, and payment was to be made subject to accounting and distribution, as provided in contract. Par. 8, Tr. p. 172.

(h) "The Gerry Horton Farms and the Gerry Horton Company were more or less affiliated, and their operation mixed together (Tr. p. 245)."

This is prior to contracts with Kaufman-Brown which are dated January 22, 1944, and November 16, 1944. Tr. p. 169 and p. 175.

At Tr. p. 245 Gerry Horton testified:

"Mr. Colby. Q. At that time, November 16, 1943, what was your business or occupation?

Mr. Horton. A. Distributing and growing of potatoes.

Q. Under what name did you operate?

A. Gerry Horton Company, and Gerry Horton Farms.

Q. And who else was interested with you in that business?

A. J. D. Althouse.

Q. And was that a copartnership between you and Mr. Althouse?

A. Yes.

Q. And did you keep separate operations, the Farms and the Company?

A. We had separate sets of books, I believe. As we progressed in our operations, the activities

> of one was more or less affiliated with the other. In fact, we were sometimes mixed up together."

The cases cited by appellants in their brief on the question of partnership are where the facts are different than in the case before the court. Those cases cited are where there was no joint carrying on of the business or the agreement did not provide for one of the persons to manage and operate the business, while the case before the court provided that Mr. Horton and Mr. Althouse should manage the farming operations (Tr. par. 9, p. 173) and they were to keep the books and records (Tr. par. 5, p. 171), and Mr. Kaufman and Mr. Brown were to sell the potatoes in Chicago (Tr. par. 8, p. 172).

The courts have held that the delegation of the management and operation of a business to one of the parties does not prevent a partnership.

> "A partnership is an association of two or more persons to carry on as co-owners a business for profit." Section 15006(1) *Corporations Code* (formerly Sec. 2400(1) Civil Code.)

In the case of *Kersch v. Taber,* 67 Cal. App. (2d) at page 504, the Court, in determining what is a partnership states:

> "The question of the existence of a partnership between the parties thereto should be determined primarily by ascertaining the intention of the parties in that regard. Where the respective parties have entered into a written agreement, the intention of the parties should be determined chiefly from the terms of the writing."

True, the rule stated in the case is a rule given in determining a partnership between the parties involved and it would certainly apply where creditors were involved. Section 15007 (4) *Corporations Code* (formerly Section 2401 Civil Code, subdivision (4)) provides:

> "The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business. * * *"

In the case of *Lusher v. Silver,* 70 Cal. App. (2d) at page 588, the court states that one important test to determine a partnership is found in the above code section, and while the plaintiff received no part of the profits he testified that it was agreed that he should, and the court found in plaintiff's favor; and the court says:

> "For the purposes of this appeal we must deem plaintiff's testimony in this respect, * * * sufficient to support the finding of the trial court that there was a partnership."

In the case in question there is no dispute as to whether or not Kaufman-Brown would receive profits as the contracts specifically provide that they would receive profits. Section 15015 of the Corporations Code provides that all partners are liable for all debts and obligations of the partnership.

The case of *Associated Piping and Engineering Co., Ltd. v. Jones,* 17 Cal. App. (2d) 107, involves an agreement very similar to the one in the present case except that agreement did not mention the people as

partners, while in the agreement before the court when all of the parties to the contract were referred to the word "partners" was used. The Appellate Court in its decision, at pages 110-111, states:

> "We may concede that a relationship of debtor and creditor is shown, and also that the contract expressly declares that appellant 'agrees to loan' various sums of money to the other parties. However, this does not establish the fact that the parties did not intend to create a partnership between themselves or as to a third person. The parties did intend to create exactly the relationship as shown by the contract, but did not intend that relationship to be called that of partnership. However, their intention in this respect is immaterial (*San Joaquin L. & P. Corp. v. Costaloupes,* 96 Cal. App. 322, 332 [274 Pac. 84]); and if the contract by its terms establishes a partnership between the parties, even the expressed intent that it should not be so classed would be of no avail. It is the intent to do the things which constitute a partnership that usually determines whether or not that relation exists between the parties. (Chapman v. Hughes, 104 Cal. 302 [37 Pac. 1048, 38 Pac. 109].) The provision in the contract that Mott and Jones 'shall retain full control of the management and operation of said business, subject, however, to the rights of the party of the first part,' (appellant herein) does not prevent a partnership, because the fact that by agreement between the parties one or more of them is given the management of the partnership enterprise does not prevent a partnership from arising. (*Westcott v. Gilman,* 170 Cal. 562, 567 [150 Pac. 777, Ann. Cas. 1916E, 437].) A partnership, especially

where, as here, the rights of third persons are involved is to be determined by the contract, taken with the conduct and dealings with the world of those who are parties to it. If that contract, and if those dealings, so far as the world is concerned, measure up to the partnership relation, with the joint duties and liabilities attaching thereto, then, so far as third parties are concerned who have had dealings with them, they are partners. (*Westcott v. Gilman,* supra, p. 568.)"

*Lyon v. MacQuarrie,* 46 Cal. App. (2d) 119, at 124:

"That there was no complete control of every part of the venture vested in each partner does not negative the existence of a partnership, for, by agreement, one partner may be given the duty of management of the partnership enterprise or any part of it. (*Thompson v. O. W. Childs Estate Co.,* 90 Cal. App. 552 [266 Pac. 293]; *Associated Piping & Engineering Co., Ltd. v. Jones,* 17 Cal. App. (2d) 107 [61 Pac. (2d) 536].)"

*Thompson v. O. W. Childs Estate Co.,* 90 Cal. App. 552:

"The fact that by agreement between the parties one of them is given the management of the partnership enterprise does not prevent a partnership from arising, under section 2395 of the Civil Code" (now Section 15001 Corporations Code).

In Section 7, 20 *Cal. Jur.,* page 686, is the following:

"The existence of a partnership may be established, although the parties may not have used the

> words 'partner' or 'partnership;' but the presence or absence of such words may be significant where the circumstances of the case leave the judicial conscience in doubt. Nor is it essential that the parties should have known that their contract in law created a partnership."

A partnership may be formed for a single venture. See *Stenian v. Tashjian,* 178 Cal. 623; *Gray v. The Janss Invest. Co.,* 186 Cal. 634.

The existence of a partnership must be determined by the law of the state which applies. *Ulter v. Irwin,* 132 Fed. (2d) 415 (C.C.A. Tex.).

Other California cases where the facts are similar to the present case are:

> *Streeter & Riddell, Inc. v. William S. Bacon,* 49 Cal. App. 327:
>
> "A written agreement to engage in the business of threshing beans for hire which provided that certain equipment belonging to one of the parties and that to be purchased by another should be their respective contributions to the business, and another should receive wages only and after reimbursements for advances to pay operating expenses the profits should be equally divided between the contributing owners, constituted a partnership, notwithstanding an express declaration in the agreement that it was not the intention to form a partnership and that neither of the parties should be liable for the acts and obligations of the other."

*Clark v. Gridley,* 49 Cal. 105, 106:

"When two parties, residing in different places, agree, the one to buy and ship wool, and to pay for the same to draw on the other, and the other to pay the drafts, and sell the wool in a home or foreign market, charging interest for his advances, the two to share equally the losses, or to divide equally the net profits; the parties are partners in the venture."

*Calkins v. Calkins,* 63 Cal. App. 292 at 298:

"* * * However, they both declared in effect that they executed a written agreement to engage in the newspaper business and to share equally the profits and losses. Neither could say what became of said instrument but their oral testimony as to its substance and effect must be held to constitute sufficient support for the finding of the court. * * *" that it was a partnership.

*Donleavey v. Johnston,* 24 Cal. App. 319, at 325:

" 'While, of course, the question whether or not a partnership exists is to be determined from the nature of the relation agreed upon, rather than the name which the parties have given to it, some weight must be allowed to the language of the parties themselves.' (*Title Ins. & Trust Co. v. Grider,* 152 Cal. 746, 752 [94 Pac. 601].)"

*Fisher v. Sweet,* 67 Cal. 228:

"The plaintiff and defendant purchased certain lands jointly for the purpose of farming and eventually selling the same. Some time after such purchase the parties entered into an agreement by which the plaintiff was to conduct the farming

operations, and the defendant to attend to shipping and selling the produce, the parties to share expenses equally, and after paying a reasonable compensation to the plaintiff for his services and the use of his teams and tools, to divide the net proceeds equally between them. *Held,* that these facts constituted a partnership between the parties with respect to the lands and the farming of the same."

*Lanpher v. Warshauer,* 28 Cal. App. 457:

"An agreement upon the subject of engaging in a certain building venture, wherein the skill and labor of one of the parties was to be combined with the capital of the other, and that the profits and losses of the business were to be equally shared, satisfies the code definition of a partnership, and must be held to constitute the parties co-partners in the absence at least of an agreement, express or implied, that the partnership relation was not to be created thereby."

*Westcott v. Gilman,* 170 Cal. 562 at 563:

"The contention that under this contract the nonexistence of a partnership is shown because there was no community of interest in procuring the fruit (which can only mean that because one party was to devote his services to the procuring of fruit, precisely as the other was to devote its services to the handling and sale of it, each without charge), is untenable."

"While the element of profit sharing does not alone and of itself establish a partnership, it is an essential element of every partnership. A partnership, especially where the rights of third

parties are involved, is to be determined by the contract, taken with the conduct and the dealing with the world of those who are the parties to it. If that contract and if those dealings, so far as the world is concerned, measure up to the partnership relation, with the joint duties and liabilities attaching thereto, then so far as third persons are concerned, who have had dealings with them, the defendants are partners."

*San Joaquin L. & P. Corp. v. Costaloupes,* 96 Cal. App. 322 at 323:

"Where a partnership engaged in the cheese manufacturing business enters into an agreement with one of its creditors whereby said creditor is to advance to the partnership up to a specified amount of money, and the cheese manufacturing business is to be continued, and the manufactured product is to be turned over to said creditor for marketing, and the net proceeds from the business after the deduction of certain specified salaries is to be divided equally between said creditor and the copartnership, and interest on the indebtedness of the partnership to said creditor is waived, the relationship between said creditor and said partnership is that of copartners."

## II.

**WHEN KAUFMAN-BROWN WITH TWO OTHER PERSONS FILED AN INVOLUNTARY PETITION IN BANKRUPTCY AGAINST GERRY HORTON FARMS OF WHICH IT WAS A PARTNER AND OF WHICH IT WAS A CREDITOR, IT CONSENTED TO THE ADJUDICATION OF SAID PARTNERSHIP OF WHICH IT WAS A MEMBER.**

Kaufman-Brown Potato Company, composed of Charles H. Kaufman and Albert H. Brown, a copartnership, was a creditor of Gerry Horton Farms, a copartnership which was raising potatoes in the year 1944. Kaufman-Brown Potato Company was a copartner of this Gerry Horton Farms, and Gerry Horton Farms, a copartnership composed of Gerry Horton and J. D. Althouse, was also a partner of the Gerry Horton Farms that was raising potatoes. The Gerry Horton Farms that was composed only of Gerry Horton and J. D. Althouse was not in the business of raising potatoes and was not a debtor of Kaufman-Brown Potato Company. Hence, when Kaufman-Brown Potato Company joined in filing an involuntary petition in bankruptcy against Gerry Horton Farms of which it was a creditor, it could only be against the partnership of which it was a partner and which partnership was raising potatoes. The Referee found and the District Judge confirmed the above facts:

> "3. That at the time the involuntary petition in bankruptcy was signed by Kaufman-Brown Potato Company the said Kaufman-Brown Potato Company, and each of its partners, composed of said persons heretofore mentioned, knew that said

Kaufman-Brown Potato Company was a partner with Gerry Horton Farms, a copartnership composed of Gerry Horton and J. D. Althouse, in the raising of potatoes, under the name of Gerry Horton Farms, a partnership, and knew that there was also a partnership composed of Gerry Horton and J. D. Althouse doing business under the name of Gerry Horton Farms not engaged in the raising of potatoes and not operating during the time potatoes were raised and in which said Kaufman-Brown Potato Company, Charles H. Kaufman and Albert H. Brown were not interested, and knew that said Kaufman-Brown Potato Company was a creditor of said partnership in the sum of $22,594.82 and was not a creditor against the Gerry Horton Farms, a partnership composed of only Gerry Horton and J. D. Althouse; and the said Kaufman-Brown Potato Company, Charles H. Kaufman and Albert H. Brown each falsely represented, knowing same was false, to the court and creditors by the filing of said bankruptcy petition that Gerry Horton and J. D. Althouse were the only partners in the partnership of raising potatoes, and that the party raising potatoes under the name of Gerry Horton Farms was the partnership composed of only Gerry Horton and J. D. Althouse; and the said Kaufman-Brown Potato Company, Charles H. Kaufman and Albert H. Brown requested and consented that the court adjudicate Gerry Horton Farms, the party who was raising potatoes and who was indebted to Kaufman-Brown Potato Company, a bankrupt." Tr. pp. 68-69.

"4. That the attorney for said petitioning creditors was Donald Kendall and that at a meeting

of creditors held on the 16th day of September, 1944, the said Donald Kendall, representing said Kaufman-Brown Potato Company and other creditors, secured the election and/or appointment of Wayne Long as trustee, and thereafter said Donald Kendall and Dominic Bianco, at the request of said trustee, were appointed as attorneys for said trustee and acted as attorneys for said trustee until they resigned on or about the first part of December 1945; and during said period of time said Kaufman-Brown Potato Company, Charles H. Kaufman and Albert H. Brown never advised the court that there were two separate partnerships and that Kaufman-Brown Potato Company was a partner of Gerry Horton Farms, the partnership which was raising potatoes, and said Kaufman-Brown Potato Company consented and requested the court to administer the estate of Gerry Horton Farms, a copartnership, who was raising potatoes and who was indebted to Kaufman-Brown Potato Company." Tr. p. 70.

Appellants in their brief, at page 16, state:

"Predicated on those grounds, possibly the Court would have had power to have drawn in Kaufman-Brown Potato Company as a partner in the adjudicated partnership of Gerry Horton Farms. In its order and its findings the Court was particularly careful, however, not to decree or find that Kaufman-Brown Potato Company was a partner of Gerry Horton Farms, a copartnership composed of Gerry Horton and J. D. Althouse, the adjudicated partnership, but did decree and find that it was a partner with Gerry Horton

> Farms in a separate partnership known as Gerry Horton Farms engaged in the growing of potatoes, and adjudicated such partnership to be bankrupt as a distinct partnership, separate and apart from Gerry Horton Farms originally adjudicated a partnership."

The last sentence of the above statement is in error as the Referee made no such finding. The Referee found that the partnership of Gerry Horton Farms that was originally adjudicated a bankrupt consisted of two partners: Kaufman-Brown Potato Company, composed of Charles H. Kaufman and Albert H. Brown, and Gerry Horton Farms (the one that was not raising potatoes), composed only of Gerry Horton and J. D. Althouse. The Referee in the certificate to the Judge (at Tr. p. 60) stated:

> "That I did not also adjudicate the partnership of Gerry Horton Farms, of which Kaufman-Brown Potato Company was a partner, a bankrupt as recited in said petition for review as said partnership was already adjudicated a bankrupt at the request of Kaufman-Brown, but said order modified and corrected said adjudication to include Kaufman-Brown Potato Company as one of the partners."

The Referee in his memorandum of opinion at page 34 says:

> "The petitioners consented to the adjudication when they filed the involutary petition against the partnership. Since Kaufman-Brown Potato Co. filed the involuntary petition against the part-

nership of which it was a partner it thereby waived any right to object to adjudication.

The Court in the matter of In re Filmar, 177 Fed. 170, held that the joining by the non-bankrupt partner with a firm creditor in a petition asking that the former firm assets be applied first on firm debts was consent to adjudication of the partnership.

See the cases of Sturn v. Ulrich, 10 Fed. (2d) 9; and The Matter of Shields and Mattison, 14 Fed. (2d) 641."

The Referee's findings on the claim of Kaufman-Brown Potato Company were as follows:

"That Kaufman-Brown Potato Company, a copartnership, advanced the sum of $22,594.82 to Gerry Horton Farms, the partnership composed of Gerry Horton Farms, a copartnership, and Kaufman-Brown Potato Company, a copartnership, and the said sum has not been paid and said sum is still due and owing by said partnership to said Kaufman-Brown Potato Company; and that said sum of money was used by said partnership in the raising of potatoes by said partnership and that said sum was not advanced or loaned to Gerry Horton Farms, the copartnership composed only of J. D. Althouse and Gerry Horton." Tr. p. 106.

The appellants in their brief at page 17 state:

"It may be that the acts of Kaufman-Brown Potato Company were such that its consent to an administration of the assets in the bankruptcy proceeding might be implied. A solvent partner

> standing by without protest to the administration of the firm assets in a bankruptcy proceeding of an insolvent partner may be deemed to have consented thereto."

We believe that the above statement is correct. The appellant Kaufman-Brown Potato Company, a co-partnership, not only falsely represented, knowing the same was false, to the court and the creditors that Gerry Horton and J. D. Althouse were the only partners of Gerry Horton Farms, the partnership that was raising potatoes, and against whom Kaufman-Brown Potato Company had a claim, but it kept the matter a secret and from the date of filing the bankruptcy petition, which was September 16, 1944, to December 1, 1945, did not advise the court that there were two partnerships operating under the name of Gerry Horton Farms, and it secured, with others, the election of a trustee. Now Kaufman-Brown Potato Company claims that its filing of the involuntary petition in bankruptcy requesting that the partnership of which it was a member and of which it was a creditor, and which partnership was raising potatoes, was not a consent to the bankruptcy court to administer the affairs of said partnership. There is no dispute as to the law that a partnership cannot be adjudicated a bankrupt if one partner is solvent and does not consent.

However, in the present case Kaufman-Brown, one of the petitioning creditors, consented to the adjudication of the partnership against whom it had a claim.

It did not have a claim against Gerry Horton Farms of which it was not a member. Can Kaufman-Brown at this late date claim that it did not consent to the adjudication of Gerry Horton Farms, after it helped surrender the small amount of assets of Gerry Horton Farms of which it was a partner to the Bankruptcy Court, secure the election of a trustee, have its attorney act as attorney for the trustee, fail to advise the Referee and the court that it had knowingly and falsely represented, knowing it was false, that J. D. Althouse and Gerry Horton were the only two partners?

Section 5-I of the Bankruptcy Act, commencing with the second sentence, provides:

> "In the event of one or more but not all of the general partners of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the general partner or partners not adjudged bankrupt;"

If the solvent partner stands by without protest and allows the firm assets to be taken into the custody and control of the Bankruptcy Court, he may be deemed to have consented thereto. *In re Harris, D.C. Ohio,* 108 Fed. 517.

Kaufman-Brown, even though a partner of Gerry Horton Farms, the copartnership which was raising potatoes, could join as a creditor in an involuntary petition in bankruptcy against the partnership of

which it was a partner. See *Meek v. Centre County Bkg. Co.,* 268 U. S. 426, 69 L. Ed. 1028; *Hunter v. Hunter & Drew,* 8 Fed. Supp. 84 (D.C. La.).

> "It is not a case of voluntary bankruptcy where one is forced into it against his will by his partner, it is compulsory and involuntary, if he refuses to join in such case." *Metsher v. Bonebrake,* 108 U. S. 66, 27 L. Ed. 654.

The Referee in his memorandum of opinion has cited the case of *In re Filmar,* 177 Fed. 170, which held that the joining by a non-bankrupt partner with a firm creditor in a petition asking that the former firm assets be applied first on firm debts was a consent to adjudication in bankruptcy. The court on page 175 quoted Section 5-h of the Bankruptcy Act, which is now Section 5-I, and stated that Swigart by the filing of his petition had appeared and the Bankruptcy Court had before it all parties in interest and his petition was a consent that the partnership property be administered by the court in accordance with the equitable principles approved by Congress.

It is to be remembered that in the present case the court amended and modified the original adjudication to include Kaufman-Brown as a partner. It is not a new petition. In the case of *In re Fuller,* 9 Fed. (2d) 553, 2nd Circuit, in an opinion written by Judge Hand, the court states that dormant partners in bankruptcy partnerships could be joined *nunc pro tunc* as alleged bankrupts notwithstanding expiration of four

months limitation of the Bankruptcy Act where failure to join him before expiration was due to excusable neglect caused by concealment of his membership in the firm.

---

## III.

**FINDINGS OF FACTS BY SPECIAL MASTER WHEN BASED ON SUBSTANTIAL EVIDENCE WILL NOT BE DISTURBED BY APPELLATE COURT.**

> "Unless otherwise directed in the order of reference the report of a referee or of a special master shall set forth his findings of fact and conclusions of law, and the judge shall accept his findings of fact unless clearly erroneous." General Order 47, Bankruptcy—U.S.C.A. Title 11, p. 115.

*In re Henry Duffy Players,* 50 F. (2d) 737 at 738 (C.C.A. 9th):

> "The foregoing findings of fact by the special master and by the court below are based on substantial evidence and are not to be disturbed by this tribunal."

*Weisstein Bros. & Survol v. Laugharn,* 84 F. (2d) 419 at 420 (C.C.A. 9th):

> "* * * where facts are litigated before the referee, and where the witnesses appeared before him, and a decision upon the controverted facts had been made by him, the court will not ordinarily be justified in reversing the finding of the referee as to the controverted facts. In re Gordon & Gelberg (C.C.A.) 69 F. (2d) 81, 83; Rasmussen v.

Gresly (C.C.A.) 77 F. (2d) 252; Remington on Bankruptcy (4th Ed.) vol. 8, 3669, p. 41; Ingram v. Lehr (C.C.A.) 41 F. (2d) 169, 170."

*Diamond Laundry Corporation v. California Employment Stabilization Commission,* 162 F. (2d) 398 at 401 (C.C.A. 9th):

"These findings were approved by the District Judge, are supported by substantial evidence, are not clearly erroneous and should not be set aside."

The above case cites Rule 52, and that portion of Rule 52 which is applicable is:

Rule 52, U.S.C.A. Title 28, page 677:

"Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court."

*Universal Sales Corp. v. Cal. Press Mfg. Co.,* 20 Cal. (2d) 751 at 772:

"In summation of this branch of the case, it need only be said that the construction given the contract in suit by the trial court appears to be consistent with the true intent of the parties and where that is so, the appellate court will not substitute another interpretation though it seem equally tenable. (*Adams v. Petroleum Midway Co., Ltd.,* 205 Cal. 221, 224 (270 Pac. 668); *Kautz v. Zurich Gen. A. & L. Ins. Co., Ltd.,* 212 Cal. 576, 582 (300 Pac. 34); *McNeny v. Touchstone,* 7 Cal. (2d) 429, 435 (60 P. (2d) 986); *Slama*

*Tire Protector Co. v. Ritchie,* 31 Cal. App. 555, 562 (161 Pac. 25).)"

---

## IV.

**THE CREDITOR'S CLAIM OF KAUFMAN-BROWN POTATO COMPANY (ONE OF THE PARTNERS) SHOULD NOT BE ALLOWED UNTIL AFTER NON-PARTNER CREDITORS' CLAIMS ARE PAID IN FULL.**

Since Kaufman-Brown Potato Company is a partner of Gerry Horton Farms, the bankrupt, its claim should not be allowed until all non-partner creditors' claims have been paid in full, as all general partners are liable to creditors and it does not seem possible that a general partner's claim should be allowed against the partnership until all other creditors who are not general partners have been fully paid.

*Remington on Bankruptcy,* Vol. 6, Section 2920, states that a general partner may not share in partnership assets until partnership creditors are paid and cites thereunder the case of *In re Rice,* 164 Fed. 514 D. C. Pa., which held that a general partner as a creditor should not participate in the partnership assets upon his claim until all partnership creditors were paid.

---

## CONCLUSION.

We respectfully submit that the two orders of the referee, as amended by the trial judge, should be affirmed, to wit:

1. The order modifying the order adjudicating Gerry Horton Farms a bankrupt by including Kaufman-Brown Potato Company as one of the partners; being the Gerry Horton Farms that was in the business of raising potatoes and the one of which Kaufman-Brown was a creditor and the one of which Kaufman-Brown was a partner.

2. The order disallowing the claim of Kaufman-Brown Potato Company against the partnership of which it was a member, until all non-partner creditors were paid.

Dated, Bakersfield, California,
February 23, 1950.

Respectfully submitted,
C. W. JOHNSTON,
CLAUDE F. BAKER,
ORAN W. PALMER.
*Attorneys for Appellees.*